

# The powers of local government in decentralised systems of government: managing the ‘curse of common competencies’\*

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## **Abstract**

The issues and problems flowing from common competencies are shared by many, if not all, decentralised and federal systems; they are a feature arising from the division of powers between two levels of government. The problem is particularly pronounced when a third level of government is added — local government. Common competencies are mainly a function of the way local government powers are defined in constitutions. Because of the position of local government in the hierarchy of governments, local government is seldom given clearly demarcated exclusive powers. Moreover, the supervisory role of the ‘senior’ levels of government over local government, inevitably means that concurrency of powers occurs.

Common competencies create a number of problems for the effective and efficient functioning of government. They include the following: duplication of services; ineffective service delivery; unfunded mandates for the lowest level of government; the domination of local government by ‘senior’ levels of government; and the lack of transparency and accountability. There are basically two approaches in dealing with these problems: first, seek greater division and certainty in the division of powers; and second, develop constructive ways of managing the tension through cooperation between levels of government.

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## **INTRODUCTION**

When introducing a training workshop on the Municipal Finance Management Bill,<sup>1</sup> which places a duty on both the national and the provincial governments to supervise the financial well-being of municipalities in South Africa, a senior provincial official referred to the ‘curse of concurrent competencies’. For him the overlapping jurisdictions were a curse that blighted his work. Concurrent competencies were synonymous with a lack of clear definition of roles and responsibilities that, in practice, set the scene for

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<sup>1</sup>The Bill was finally passed as the Municipal Finance Management Act 56 of 2003.

turf battles. Moreover, where the province and the national government are governed by different political parties, political competition further complicates the picture.

Common competencies occur where more than one level of government (usually state and local, but not infrequently federal as well), share authority (be it legislative, executive or both) over the same functional area. The area may be education, health, housing or the environment. The question that then arises, is how effective governance can be delivered in these common functional areas.

The issues and problems flowing from common competencies are shared by many, if not all, decentralised or federal systems; they are a feature arising from the division of powers between two levels of government. Whereas the older federations such as the USA, Canada and Australia, sought to establish dual federalism, seeking to establish clearly demarcated areas of competence, the more modern multi-level governments, such as Germany, India, Brazil and South Africa, have all institutionalised the notion of common competencies.

### **Local government**

The problem is particularly pronounced when a third level of government is added — local government. First of all, functional areas, and thus competencies, must now be split three ways, adding to the complexity of government. Second, because local government is still regarded as the stepchild in federal systems, a clear constitutional demarcation of exclusive areas of competence is seldom found. The powers of local government are thus often obscured by a mush of federal and state legislation.

The issue of concurrency is becoming more pronounced as local government is increasingly becoming a fully-fledged, constitutionally recognised, form of government in countries with federal features. With its status guaranteed in constitutions, the allocation of powers that often follows, inevitably entails concurrency of powers.

The first federal constitutions of the modern era did not include local government as a level of government, as evidenced by the constitutions of the United States (1787), Switzerland (1848), Canada (1867) and Australia (1901). Local government was simply a competency of the states or provinces. Concurrency issues would normally not arise because the state would determine the responsibility of local authorities. If any conflicts arose over functions and powers, the superior level of government would simply redefine the allocation of competencies to make the conflicts disappear. Resolving such conflicts is more complex when the functions of local government are contained in a constitution and local self-governance is guaranteed.

The constitutional recognition and protection of local government have occurred during the last fifty years. The Constitution of the Federal Republic of Germany of 1949 enshrined municipalities' right to self-government. Nearly twenty years later the Spanish Constitution of 1978 also guaranteed local autonomy. Brazil's return to civilian rule was also marked by the extensive protection of local self-government in the constitution of 1988 and the listing

of local government's powers. 1992 saw the entrenchment of local government in the 73<sup>rd</sup> and 74<sup>th</sup> Amendments to the Indian Constitution. South Africa followed suit with the extensive protection of local self-government in the South African Constitution of 1996. The Nigerian Constitution of 1999 also entrenched local government as a level of government. The recognition of local government in the new Swiss Constitution of 1999 recognised the importance of municipalities and cities in practice.

Even in those countries where local government is subservient to state or provincial government, the problem of common competencies is encountered. Initially, municipalities' functions and powers were determined in the greatest possible detail by the superior level of government and any conflict would be removed by the superior level. Today, however, the issue of concurrency is increasing in importance because of changes to the way in which local government powers are being defined. At first powers were detailed 'shopping lists' which were strictly enforced by the *ultra vires* rule. Today, municipalities are increasingly being given general plenary powers in, for example, the United States, Canada and Australia.

In the first part of the article, the various manifestations of common competencies are outlined. The second part contains an exposition of the various problems experienced where competencies are common. In the last part, possible ways of managing the recurring problems are explored.

#### **NATURE OF COMMON COMPETENCIES**

Common competencies are mainly a feature of the way in which local government powers are defined in constitutions. Because of the position of local government in the hierarchy of governments, local government is seldom given exclusive powers, neatly tabulated in a list. The supervisory role of the 'senior' levels of government, inevitably results in concurrency of powers.

#### **Defining local government competencies**

The constitutional allocation of competencies to local government takes various forms. A common approach is to itemise a list of functional areas that fall within the domain of municipalities. In India, the 73<sup>rd</sup> and 74<sup>th</sup> Amendments to the constitution provide a long list of permissible local government functions from which the states may determine which should be devolved to the various types of local authority.<sup>2</sup> The Brazilian Constitution of 1988 grants local authorities powers under two broad heads. The first involves a general, all-purpose powers common to all three levels of government.<sup>3</sup> The second is a more detailed list, reserving powers to local government in the areas of intra-municipal transport, pre-school and elementary education, preventive health care, land use and historical and

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<sup>2</sup>See Pervez 'Third-tier of governance' (2001) 2/1 *Indian Journal of Federal Studies* 136.

<sup>3</sup>Article 23.

cultural preservation.<sup>4</sup> In South Africa the 1996 Constitution sub-divides the provinces' lists of concurrent and exclusive competencies into Parts A and B, with the latter listing the functional areas of municipalities.<sup>5</sup> In terms of the Nigerian Constitution of 1999, local authorities' functional areas are found in two lists. In the first list, broad areas are mentioned in which local authorities must participate in state activities.<sup>6</sup> The second list contains more specific, but more mundane, municipal functions.<sup>7</sup>

Even in cases where the powers of local government are explicitly listed, it seldom means that municipalities have exclusive jurisdiction over the listed functional areas; they are usually overlaid with national or provincial regulatory frameworks.

A more limited approach to defining local government powers is to couch them in the most general of ways. In a number of constitutions the right of local government to manage its 'own affairs' or 'local interests' is guaranteed, but the exact ambit of the 'own affairs' or 'local interests' is not spelled out. In the German Basic Law the powers of local government are no better defined than: 'The municipality shall be guaranteed the right to manage all the affairs of the local community on their own responsibility.'<sup>8</sup> A similar statement is also to be found in the Brazilian Constitution, namely an exclusive local government function is to 'legislate on subjects of local interest'.<sup>9</sup> The Spanish Constitution, likewise, guarantees that municipalities shall enjoy self-government for the management of their own interests.<sup>10</sup>

The various ways in which local government competencies are defined, all produce some level of overlap between the functions of the state or province and local authorities. The following types of overlay and concurrency can be identified:

*Explicit concurrent competencies*

The first and most obvious type of common competencies is where specific functional areas are given concurrently to the state/province and local government. This approach is, of course, not unique to allocation of local government powers, but is also used in the distribution of powers between federal/national government and states/provinces. The German Basic Law,<sup>11</sup> the Indian Constitution<sup>12</sup> and the South African Constitution of 1996,<sup>13</sup> all

<sup>4</sup>Article 30. See further Souza 'Political and financial decentralization in democratic Brazil' (1994) 20/4 *Local Government Studies* 588 at 599.

<sup>5</sup>Section 156(1).

<sup>6</sup>Section 7(2).

<sup>7</sup>Fourth Schedule.

<sup>8</sup>Article 28 German Basic Law 1949.

<sup>9</sup>Article 30 Brazilian Constitution 1988.

<sup>10</sup>Article 137 Spanish Constitution 1978.

<sup>11</sup>The German Basic Law allocates to the federal government both exclusive and concurrent powers, the latter being shared with the *Länder* (art 74 and 74a).

<sup>12</sup>Apart from the exclusive Union and state lists of competencies, there is also a concurrent list of fifty-two items (ss 245–246). See further Basu *Shorter Constitution of India* (1994) 829.

contain list of concurrent competencies.

The Brazilian Constitution of 1988 offers an example of common competencies granted to all three levels of government. In article 23 the Union, states and municipalities are given 'joint powers' that cover a range of activities from the most general to the more specific. The powers concern the general well-being of the nation and include the responsibility to 'safeguard public health, to protect the environment and combat pollution in any of its forms; to preserve the forests, fauna and flora; and promote agricultural and livestock production and organize food supply.' In common with most concurrent list of competencies, an override rule is provided; local by-laws cannot be passed that do not comply with federal and state legislation.<sup>14</sup>

#### *'Participatory' common competencies*

A variation of the first type is the so-called participatory competencies — local government is expected to work alongside and assist the other levels of government in a particular functional area. The Nigerian Constitution of 1999 offers a good example of this. After listing local government's 'exclusive' powers, the Constitution provides that the functions of local authorities 'shall include participation' in state functions such as the provision of education, agriculture, and health services.<sup>15</sup>

Even where the allocation of competencies is distinct, judicial interpretation can impose participatory duties. In South Africa, the Constitutional Court,<sup>16</sup> in giving effect to the socio-economic right to adequate housing,<sup>17</sup> held that the duty on the government to provide shelter as a minimum requirement, fell on all three spheres of government — national, provincial and local. This despite the fact that 'housing', as a competency, does not fall within local government's list of competencies, but forms part of the national and provincial governments' list of concurrent competencies.<sup>18</sup> The court reasoned that in view of the principle of cooperative government, policies and actions of all three spheres must cohere and be coordinated to give effect to the socio-economic right to housing. While the national government would ultimately be responsible for the provision of finances, and the provincial government for the implementation of a housing programme, municipalities would play a supportive role in the provision of water, sanitation and electricity — all matters that fall squarely within their functional areas.<sup>19</sup>

National legislation can also confer participatory functions. In Spain

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<sup>13</sup>Section 44(1) and Schedule 4. See Steytler 'Concurrency and co-operative government: the law and practice in South Africa' (2001) 16/2 *SA Public Law* 241.

<sup>14</sup>Soures 'Intergovernmental relations in Brazil' in *Intergovernmental relations: an international comparative study* (1998) (Bellville: School of Government, University of the Western Cape) 62.

<sup>15</sup>Article 7(2) Nigerian Constitution 1999.

<sup>16</sup>*Government of RSA v Grootboom* 2000 (11) BCLR 883 (CC).

<sup>17</sup>Section 26 constitution.

<sup>18</sup>Schedule 4A constitution.

<sup>19</sup>See De Visser, Mettler & Cottle 'Realising the right to water: pipe dream or watershed?' (2003) 7/1 *Law, Democracy & Development* 27.

municipalities are authorised to provide 'complementary services' to those of the other levels of government in the areas of education, culture, housing, health and environmental protection. This results in shared competencies with national and regional governments.<sup>20</sup>

### *Supervisory overlap*

In practice common competencies arise where local government's powers are exercised within regulatory frameworks set by federal or state governments. With regard to the same functional area, both levels of government have authority, albeit it that the state government's powers should be only regulatory.

In South Africa the Constitution provides that national and provincial government may regulate the exercise by municipalities of their powers in the listed functional areas.<sup>21</sup> Both the national and the provincial governments have legislative authority to see to the effective performance by municipalities of their functions by regulating their executive authority.<sup>22</sup> However, such regulation is subject to an elusive override test: the national and provincial government may not 'compromise or impede a municipality's ability to govern'.<sup>23</sup>

Framework legislation is also often used in countries where local government enjoys no constitutional protection. For example, in the Canadian province of Newfoundland, having granted the cities in that province plenary powers, provincial legislation may set standards for municipal services in the fields of the environment, safety, and the protection of people and property.<sup>24</sup>

Framework legislation, of course, begs the question of where regulation stops and undue control and intervention begin. Moreover, framework legislation, as the experience in Germany shows,<sup>25</sup> can be very extensive and in the end governs the entire functional area.

### *Open-ended or vaguely defined competencies*

Even where competencies are exclusively allocated to local government, vague and open-ended definitions of such powers result in practice in overlapping competencies. As indicated above, in the Constitutions of Germany, Brazil and Spain the right of local government to manage its 'own affairs' or 'local interests' is guaranteed, but the exact ambit of the 'own affairs' or 'local interests' is not spelled out. The scope of 'local interest' is, of course, not self-defining.

A similar definitional problem is encountered in a number of constitutions

<sup>20</sup>Canel 'Local government in the Spanish autonomic state' (1994) 20/1 *Local Government Studies* 44 at 50.

<sup>21</sup>De Visser 'Powers of local government' (2002) 17 *SA Public Law* 223.

<sup>22</sup>Section 155(7) constitution.

<sup>23</sup>Sections 156(3) & 151(4) constitution.

<sup>24</sup>Newfoundland Cities Act of 2000.

<sup>25</sup>Bertelsmann Commission *Disentanglement 2005: ten reform proposals for better governance in the German federal system* (2000) at 11ff.

where a given functional area is divided between two levels of government on the criterion which is no more precise than the terms 'local' or 'state'. A state will be allocated 'state health services' while a municipality is responsible for 'local health services'. This again begs the question of where 'local health services' end and 'state health services' commence? Definitions of this kind appear in the Constitutions of Brazil,<sup>26</sup> South Africa, and India. In South Africa, for example, functional areas overlap between provincial and local government in the areas of health, tourism, transport, trade, sport, roads, recreation and even abattoirs. There is no *a priori* answer to the question of where local government ends and state or provincial government begins. When does a health service stop being a municipal concern and become a provincial health service? Without a clear answer there is an inevitable overlap in competency with regard to the administration of health services.

#### *Nature of functional area*

In many areas the neat division of competencies is not a feasible option and overlaps must inevitably occur because life can simply not be poured into watertight compartments. By according to one level of government the responsibility of, say, the environment, overlaps will inevitably emerge with a host of competencies of the other levels of government. In South Africa, for example, the environment is a common competency of the national and provincial governments, yet a number of local government competencies impact on the environment, such as beaches, waste disposal, air pollution, sanitation, and tourism. This illustrates the fact that the interconnectedness of social life makes neat allocation of competencies virtually impossible.

#### *Plenary powers*

The granting of plenary powers to local authorities may also have the effect of creating fields of common competencies. In federations where local government is not constitutionally protected, the allocation of powers has changed from precise descriptions which were restrictively interpreted, to broader plenary powers which should be generously interpreted. An example is the Local Government Act of 1998 in Canada's British Columbia, where municipalities are accorded plenary powers subject only to federal and provincial law. While any conflicts in legislation are resolved in favour of the senior levels of government, the effect is that provincial and local governments are active in the same fields.

### **PROBLEMS OF CONCURRENCY**

Common competencies create numerous problems and impact on the effective and efficient functioning of government. They may also impact adversely on the democratic foundations of government where the practice of common competencies may lead to the diminishing of accountability by the various spheres of government to the electorate. The problems caused by common competencies include the following:

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<sup>26</sup>Article 30.V Brazilian Constitution.

### **Duplication of services**

Where two levels of government are responsible for a functional area, both may provide the same service. Competition for resources and political advantage is an integral part of federalism, even where the notion of cooperative government is the prevailing norm.<sup>27</sup> Such competition may result in the duplication of services leading to a waste of scarce resources, something developing nations can ill afford.

### **Ineffective service delivery**

Where services must be rendered by more than one level of government in a participatory manner, confusion with regard to the respective mandates and responsibilities, poor coordination and ineffective communication can result in inefficient and slow service delivery. This is much in evidence in Nigeria.<sup>28</sup>

### **No service delivery**

In the worst case scenario, confusion as to which level of government is responsible for what functions can result in the situation that not one of the responsible governments provides the service, to the prejudice of the citizens. When citizens then complain about a lack of services, governments can shirk their responsibility by pointing fingers at the other — a neat case of passing the buck.

An example of this scenario is the outcome of the Constitutional Court case of *Grootboom*, mentioned above. The court held that all three spheres of government are collectively responsible for implementing the right to housing and that they should provide shelter, water and sanitation for the claimant, a mother and her children who lived in dire circumstances in a shack settlement which had no running water or sanitation. Two years after the court decision, the mother and her children were still living without shelter, water and sanitation. In part this sorry state of affairs can be attributed to the fact that not one of the three spheres of government was explicitly burdened by the court with the responsibility of providing the required services. The result could have been very different had the court *a quo's* judgment been upheld.<sup>29</sup> The trial judge ordered that the three spheres of government report back to court within a month, setting out clearly who would be doing what in giving effect to the claimant's right to a shelter.

### ***Local government becomes solely responsible***

A problem frequently encountered is where two levels of government are responsible for the same functional area, and the state government withdraws from the field, leaving local government as the sole provider of a service. While municipalities may wish to exercise their autonomy in the area, the withdrawal

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<sup>27</sup>See Kincaid 'The competitive challenge to cooperative federalism: a theory of federal democracy' in Kenyon & Kincaid (eds) *Competition among states and local government: efficiency and equity in American federalism* (1991) 87.

<sup>28</sup>World Bank, Nigeria-Community and Local Government Development Project, Report PID10650 (2001) ([www.worldbank.org/infoshop](http://www.worldbank.org/infoshop)), 1–2.

<sup>29</sup>*Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C).



of the senior levels is often accompanied with the withdrawal of state funds, leaving local government with an unfunded mandate. The result may again be the failure to provide an adequate service.

### **Local government dominated by overregulation**

Whereas in theory all levels participate on an equal footing in the delivery of a service in a common functional area, be it education or health care, in practice local government is often dominated by the other levels of government. There is no true partnership. In Brazil, where federal and state legislation trump local laws, in the area of common competencies, the federal law on common competencies enhance harmony but restricts local autonomy.<sup>30</sup> The same happens even when the role of the state or federal government is restricted to framework legislation. The experience in Germany has been that such legislation overregulates to the exclusion of local government's own powers.

### **Lack of accountability**

A common problem with common competencies is the lack of accountability to the electorates of the respective governments. As noted above, where no services have been delivered, blame can be shifted by one branch of government to the next. Where there has indeed been cooperation between the different levels of governments, and jointly they have delivered an inferior service, accountability can again be avoided by blaming the other levels for the inadequacy.

The practice of passing the buck is facilitated by the fact that joint administration of common competencies often results in a lack of transparency. The electorate simply does not know who is to be held accountable for what programmes or activity. The entanglement between the federal government and the states has resulted in what has been described in Germany as, 'a system of organized irresponsibility'.<sup>31</sup> Within the web of entangled intergovernmental relations, no one can be held responsible by the public.

### **MANAGING THE 'CURSE OF COMMON COMPETENCIES'**

Concurrency of competencies is part and parcel of the fabric of modern federations. Moreover, it is a necessary part of federalism given the complexity and cross-cutting nature of the social problems that the different levels of government face. It is simply not viable to recapture a dual model of federalism where functions are neatly allocated and the levels of government need not interact cooperatively. Writing in the context of federal/state relations, Watts<sup>32</sup> points out that the recognition of the inevitability of overlaps, has led to the extensive use of concurrent legislative jurisdiction. The advantage is that it provides a measure of flexibility in the distribution of

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<sup>30</sup>Soares n 14 above at 60–62.

<sup>31</sup>Bertelsmann Commission n 25 above at 16.

<sup>32</sup>Watts *Comparing federal systems* (2ed 1999) at 38.

power, 'enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance'.<sup>33</sup> Nation-wide standards could be legislated, giving subnational units room to legislate the detail and deliver services in a manner that is sensitive to local circumstances. He further notes that concurrent lists 'avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, and reduce the likelihood that such minute subdivisions will over time become obsolete in changing circumstances'.<sup>34</sup>

Yet the problems that concurrency create cannot be left unattended as they impact negatively on the very functioning of government — the provision of services and the promotion of social and economic development as well as the democratic accountability of local authorities to their constituencies.

Countries are addressing the problems of concurrency along a range of options. As the issue also pervades federal/state relations, the solutions sought at this level can provide useful guidelines on how to structure relations with local government.

The approaches to the problems of common competencies are basically twofold: first, seek greater division and certainty in the division of powers, and second, develop constructive ways of managing the tension through cooperation.

#### **Greater division of powers**

While the trend is towards greater cooperation, calls are frequently made to reduce the level of concurrency where that is both feasible and advisable. In Germany, one proposal to reduce the level of entanglement between state and federal governments, is to allocate powers more clearly between the two levels.<sup>35</sup> This entails a fundamental re-examination of what the appropriate location of functions is and will usually require constitutional amendments.

#### **Greater clarity on exclusive powers**

Where there is a constitutional division of powers between two levels of government, attempts have been made to make that division clearer. Where concurrency is created by ambiguous definition of local government exclusive functions, attempts have been made to get greater clarity on those functions. This can be done either through judicial interpretation, legislation or intergovernmental pacts.

The German Federal Constitutional Court has sought to give content to the concept of 'the affairs of the local community' and has ruled on specific issues

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<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid.*

<sup>35</sup>Bertelsmann Commission n 25 above at 25.

in favour of a municipality, such as naming itself.<sup>36</sup> A definitive definition of local self-government has, not surprisingly, eluded it. The proper domain of local government is a political construct that is not easily given legal clothing.

Federal or state legislation could seek to elaborate on the powers of local government. While the Spanish Constitution guarantees municipalities local self-government for the management of their 'own interests', their powers are spelled out in detail in the Local Government Act of 1985, which lists specific functional areas. This method results often in a top down approach to the allocation of powers and functions. A more pragmatic solution is for state and local governments to conclude compacts or agreements on their understanding of the reach of their respective powers.

After the first round of decentralisation, entrenching the creation of Autonomous Communities in the Spanish Constitution, the second round of decentralisation resulted in the *Pacto Local*.<sup>37</sup> The *Pacto Local* is an agreement between the central state and the Federation of Spanish Municipalities and Provinces (FEMP) for the development, clarification and amplification of the competencies of municipalities. The object of the agreement was to effect a second decentralisation of competencies and, to avoid confusion of roles, to clarify the distributed competencies. The process of negotiating and approving the *Pacto Local* took the best part of five years, commencing in 1993 when the FEMP voiced the necessity of such a *Pacto Local*.

The agreement is important as it serves as a significant model of cooperative federalism. It strives to clarify the distribution of competencies in a system where the major part of the competencies is shared. The agreement has been criticised because of its democratic deficiencies, an inevitable result of executive federalism. The answer to this criticism has been that the agreement strengthens democracy because it favours transparency. The Spanish Constitutional Court has recognised the importance of the agreement; although it is not binding, it is nevertheless important from a policy point of view.

The agreement can work adequately depending on whether there is cooperation or conflict between the parties. The financing of local government

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<sup>36</sup>In the *Hobenegglen* case ((1982) 59 BverfGE 216) the question was whether a *Land* could change the name of a municipality without the latter's consent. The Federal Constitutional Court held that art 28(2) protected local self-government, 'guaranteeing local units of government jurisdiction over virtually all matters concerning the local community as well as the authority to transact business autonomously in the area. [State legislator] may impose legal restrictions on local self-government if and insofar as these restrictions leave the core functions of [this right] intact.' See Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) at 115; Ipsen 'Relations between subnational and local governments, structured by subnational constitutions' in Konrad-Adenauer Stiftung, Johannesburg 'Subnational constitutional governance' (1999) Seminar Report at 60.

<sup>37</sup>See Violeta Ruiz Almendral 'Local government powers in Spain' (unpublished paper) delivered at International Conference on Cities and Federalism: International Perspectives, 6-7 May 2002, Rio de Janeiro, Brazil.

is a crucial element in making the *Pacto Local* effective. What is further needed is for each Autonomous Community to have its own pact with local authorities in its area.

### **Effective management of concurrency**

Concurrency of powers is most often the intended result of a constitution. The provisions are clear — concurrency is desired — and the only way forward is through the effective management of concurrency of competencies in order to minimise the negative consequences of concurrency. A number of good governance principles have been used in different countries to guide inter-governmental relations in this regard. The main thrust has been to define, within the areas of concurrent functions, the roles and responsibilities of local government with greater clarity and to seek greater role differentiation.

### *Principle of subsidiarity*

The principle of subsidiarity has often been applied to the exercise of common competencies. Subsidiarity means that a function should be performed at the lowest possible level where that particular function can be carried out.<sup>38</sup>

Where the legislative allocation of powers is fixed in the constitution, the principle can be applied to the administration of the legislation. In South Africa, for example, a municipality is entitled to the assignment of the administration of a function, which falls within a province's jurisdiction, if it can most effectively be administered locally and if the municipality has the capacity to do so.<sup>39</sup>

Subsidiarity is a notoriously vague and imprecise principle. What is best administered at the lowest level? In answering this question the principle of subsidiarity holds that if in doubt, favour the lowest level of government.<sup>40</sup> Practical measures must also be devised to give concrete effect to the principle of subsidiarity. One method is for state governments to formulate a general law in the area of common competency that would apply to all municipalities until such time that a municipality has passed its own law.

### *Sub-division of legislative competency*

Where both levels of government are responsible for the same functional area, a subdivision of the administration of that area can be effected by separating the governing principles from the operational detail. In Germany, for example, the federal government has been given the power to adopt framework legislation on a range of matters, while the *Länder* may fill in the operational details. In practice, however, this has often resulted in overregulation with hardly any space left for the *Länder*. To deal with this problem a new proposal

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<sup>38</sup>See Carpenter 'Cooperative government, devolution of powers and subsidiarity: the South African perspective' in Konrad-Adenauer-Stiftung, Johannesburg 'Subnational Constitutional Governance' (1999) at 45.

<sup>39</sup>Section 156(4) constitution.

<sup>40</sup>Bertelsmann Commission n 25 above at 18.

is that the federal government be restricted to 'legislation of principle'.<sup>41</sup> Only the broad principles of a topic are to be legislated by the federation, with the bulk of the competency falling in the domain of the states.

A further method of limiting state dominance over local government is to limit the overriding power of state legislation over local laws. In the case of common competencies, conflicts between state and local government legislation is usually resolved by state legislation automatically prevailing over local government law. In order to implement the principle of subsidiarity, the conflict resolution mechanism could be more nuanced. In South Africa, for example, a national or provincial law prevails over a municipal by-law only if it does not 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.<sup>42</sup> While the criteria are imprecise, they could be used to protect municipalities from unduly intrusive measures that overregulate local government affairs.<sup>43</sup>

#### *Better coordination of executive competencies*

Where a functional area remains under the jurisdiction of two or more levels of government, its proper administration can be effected through constructive intergovernmental coordination. Again the emerging theme is that of establishing clarity of functions and responsibilities through intergovernmental structures.

An interesting development in this regard is the use of non-legal protocols and memoranda of understanding between state and local government. In Australia, Tasmania has been the leading state in developing written agreements between the state government and organised local government, as well as with local authorities. In 1999 a protocol agreement was signed between the Premier of Tasmania and the local government association setting up a non-statutory local government council to develop a partnership between state and local government.<sup>44</sup> This cooperation is based, among other things, on a clear division of responsibilities. The state maintains responsibility for services requiring uniform statewide standards. Important for local government is the principle that amendments to existing service delivery arrangements will be subject to contractual agreements between the parties.

#### *Vigorous local government*

The dominance of federal and state governments in areas of common competencies is often the result of local government failing to exert its existing powers. If local government leaves a legislative vacuum, it will certainly be filled by other levels of government. In Germany, for example, it is remarked that the *Länder* have surrendered to the federal government power in a number of concurrent functional areas by simply not exercising their own

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<sup>41</sup>*Id* at 20.

<sup>42</sup>Section 151(4) constitution.

<sup>43</sup>De Visser n 21 above at 234.

<sup>44</sup>Tasmania *Framework for developing state-local government partnership agreements* (rev December 1999).

powers.<sup>45</sup> The same has occurred in South Africa.<sup>46</sup>

In order to counter the dominance of state governments the appropriate response is a vigorous local government that can occupy concurrent functional areas. By so doing, local government also utilises the opportunity to influence federal and state policy.

It is important to note that overlapping competencies not only give rise to problems but also offer opportunities for local government. It has been argued in Brazil that the extensive ambit of common responsibilities has given the states and municipalities an important role in policy-making and implementation processes, particularly in the area of social services.<sup>47</sup>

## CONCLUSION

Common competencies are an integral part of most federal systems. The question is, then, how effectively to manage the problems that flow from this reality. The most common approach is to seek greater role clarification within the context of concurrency. This is done at both legislative and executive levels. Effective intergovernmental relations and structures perhaps remain the most important way through which the effective coordination of common competencies can be achieved. A part of this process is the allocation of responsibilities in terms of the principle of subsidiarity to the appropriate level of government on the basis of mutual agreement. Because common competencies tend to obscure lines of responsibility — the public does not know who is responsible for what function — clarity with regard to job allocation and responsibility is important for the enhancement of both democratic accountability and, in the end, effective service delivery and development.

There will inevitably be a tension between local government and the other levels of government with regard to competencies. This is part of a healthy competition that leads to experimentation and innovation, one of the underlying purposes of a decentralised system of government. There is a limit to which the overlap between competencies can be minimised. For the rest it must be effectively dealt with through the principles of cooperative government effectively to manage the 'curse of concurrent competencies'.

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<sup>45</sup>Bertelsmann Commission n 25 above at 13.

<sup>46</sup>See Steytler n 13 above at 254.

<sup>47</sup>Souza n 4 above at 606.